90-1737

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FULTON COUNTY, GEORGIA,
Cross-Petitioner,
v.
S.J. GROVES & SONS COMPANY AND
JASPER CONSTRUCTION COMPANY,
Cross-Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a local or state government recipient of federal funds under a federal grant may be liable in monetary damages to a private party for its good faith reliance upon and compliance with presumptively valid federal regulations that are authorized by Congress, if those regulations are subsequently held invalid?

2. Whether *American Trucking Associations v. Smith*, 495 U.S. ____, 110 L.Ed.2d 148 (1990), holds that a local or state government recipient of federal funds under a federal grant could be liable in monetary damages to a private party for its good faith reliance upon and compliance with presumptively valid federal regulations authorized by Congress, if those regulations are subsequently held invalid?

LIST OF INTERESTED PARTIES

The following were parties to the proceedings in the Eleventh Circuit Court of Appeals: S.J. Groves & Sons Company, Jasper Construction Company[1] (Petitioners/Cross-Respondents) (hereinafter "Groves"), and Fulton County, Georgia (Respondent/Cross-Petitioner) (hereinafter "Fulco").

The United States Department of Transportation was a party to the proceedings in the District Court and an appellant in the Court of Appeals. On September 18, 1989, the Eleventh Circuit dismissed the United States Department of Transportation pursuant to its motion for voluntary dismissal.

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[1] Jasper Construction Company is a wholly owned subsidiary of S.J. Groves & Sons Company.

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CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

The Court of Appeals' opinion sought to be reviewed is reported at 920 F.2d 752 (11th Cir. 1991) and is reproduced in the Appendix to the Petition for Writ of Certiorari filed by Groves on April 6, 1991 at 1a (petition pending, Case No. 90-1562). The District Court's opinion is reported at 696 F. Supp. 1480 (N.D. Ga. 1987) and is reproduced in the Appendix filed by Groves at 1b. The District Court's other orders are unpublished but are reproduced in Groves' Appendix at 1c, 1d, and 1e.

JURISDICTIONAL STATEMENT

The opinion and judgment of the Eleventh Circuit Court of Appeals were entered on January 7, 1991. This Cross-Petition has been timely filed in accordance with Rules 12.3 and 13 of the Rules of this Court. Fulco received a copy of Groves' Petition for a Writ of Certiorari on April 8, 1991. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Section 30 of the Airport and Airway Development Act of 1970, as amended by the Airport and Airways Development Act Amendments of 1976, 49 U.S.C. § 1730, as amended by the Airport and Airways Improvement Act of 1982, 49 U.S.C. § 2219:

> The Secretary shall take affirmative action to assure that no person shall, on the grounds of race, creed, color, national origin, or sex, be excluded from participating in any activity conducted with funds received from any grant made under this chapter. The Secretary shall promulgate such rules as the Secretary deems necessary to carry out the purposes of this section and may enforce this section, and any rules promulgated under this section, through agency and department provisions and rules which shall be similar to those established and in effect under title VI of the Civil Rights Act of 1964. The provisions of this section shall be considered to be in addition to and not in lieu of the provisions of title VI of the Civil Rights Act of 1964.

49 Code of Federal Regulations, Part 23 (45 Fed. Reg. 21172 et seq., March 31, 1980, as amended at 46 Fed. Reg. 23457 et seq., April 27, 1981, and as amended at 46 Fed. Reg. 60458 et seq., December 10, 1981) entitled "Participation by Minority Business Enterprises in Department of Transportation Programs":

> 49 C.F.R. § 23.01-23.55 is reprinted in Groves' Appendix at 1f.

42 U.S.C. § 2000(d) (Title VI):

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

O.C.G.A. § 36-10-2:

> Whenever it becomes necessary to build or repair any courthouse, jail, bridge, causeway, or other public works in any county, the county governing authority shall cause the same to be built or repaired by letting out the contract therefor to the lowest bidder, at public outcry, before the courthouse door, after having advertised the letting of the contracts, as provided in Code Section 36-10-3, provided that such county authorities shall have authority to reject any and all bids at the public letting. If, in their discretion, the public interest and economy require it, the county authorities may build or repair any public buildings, bridges, causeways, or other public property in the county by contract or sealed proposals, to be invited under the same provisions as to specifications and like information as are provided in Code Sections 36-10-3 and 36-10-4.

STATEMENT OF THE CASE

This case arises out of a resurfacing project at the Fulton County, Georgia Airport. The Fulco Airport is designated as a "reliever airport" by the United States Federal Aviation Administration ("FAA"). The function of a reliever airport is to provide facilities to divert as much general aviation traffic from air carrier airports such as Hartsfield International Airport as is possible in the interest of safety to the traveling public using such fields. Because Fulco's Airport is a designated "reliever airport", it is eligible for federal assistance under Section 30 of the Airport and Airway Development Act of 1970, as amended by the Airport and Airways Development Act Amendments of 1976, 49 U.S.C. § 1730, as amended by the Airport and Airways Improvement Act of 1982, 49 U.S.C. § 2219 ("AADA").[2]

The FAA determined that the instrumented runway at the Airport was in a rapidly deteriorating condition and would soon become hazardous and unusable and have to be closed if it was not repaired immediately. Closing the instrumented runway would have resulted in immediately closing the Airport. The DOT/FAA also determined that the runway repair project "be furnished a high-priority status to federal funds."

Because Fulco did not have sufficient funds at that time to repair the runway, Fulco in order to keep the Air-

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[2] One of the purposes of the AADA as amended in 1976 and in 1982 was to make funds available for improvements to reliever airports because of the critical purpose they serve in connection with aviation traffic and safety to the travelling public. 1982 U.S. Code Cong. & Ad. News 1156, 1159, 1161, 1163, 1165, 1175; 1976 U.S. Code Cong. & Ad. News 1600, 1602-04, 1608, 1611, 1637, 1638, 1639, 1640, 1644. According to the legislative history of the AADA, "reliever airports" serve a vital role *nationwide*, and it is a *federal* policy to maintain the operation of and improve reliever airports. *Id.*

port in operation had no alternative except to apply for a grant from the United States Department of Transportation ("DOT") pursuant to the AADA. The record shows that Fulco had to receive financial assistance from the United States to accomplish the Airport Project, especially based on the immediate need for the work. There is no evidence that Fulco had any alternative available to it based on the circumstances at that time.

As an express condition to approval of the Federal Grant Agreement from the FAA and the DOT, Fulco was required to comply with the provisions of the AADA and the regulations promulgated by the DOT, including the provisions of 49 Code of Federal Regulations, Part 23 (45 Fed. Reg. 21172 *et. seq.*, March 31, 1980, as amended at 46 Fed. Reg. 23457 *et seq.*, April 27, 1981, and as amended at 46 Fed. Reg. 60458 *et seq.*, December 10, 1981) entitled "Participation by Minority Business Enterprises in Department of Transportation Programs" (hereinafter "49 C.F.R. Part 23"). The DOT Regulations and Federal Grant required Fulco to prepare and submit for approval by the FAA a Minority Business Enterprise ("MBE") program solely for the Airport Project. In compliance with the DOT Regulations and Federal Grant, Fulco prepared a five-year MBE program for the Airport Project in 1982 ("the 1982 Program").

The DOT Regulations and Federal Grant provide that meeting the MBE participation goals or making a good faith effort to meet the goals is a condition of Fulco's receiving the DOT assisted contract. *The District Court found and there is no dispute that the Fulco 1982 MBE Program was developed solely to comply with Section 30 of the AADA, the DOT Regulations, and as an express condition of the Grant Agreement.* Fulco is contractually bound to the commitments made in the MBE program as approved the DOT. The Grant Agreement provides that Fulco's adoption of the MBE Program is a "legal obligation," which if Fulco failed to adopt would subject it to

sanctions, including termination of the agreement or other measures which may affect Fulco's ability to obtain future DOT financial assistance. [Fulco's Appendix at 40a-41a].

The DOT/FAA reviewed the Fulco MBE Program and determined its compliance with 49 C.F.R. Part 23 (in effect in April, 1982), including the minority and female percentage goals. The FAA officially approved Fulco's MBE Program on or about April 20, 1982. In approving this Program, the FAA determined the MBE participation percentage goals to be reasonable, practical, attainable, and in compliance with 49 C.F.R. Part 23.45.

The bid which Groves submitted on the Airport Project (approximately $820,000) was the lowest dollar bid received by Fulco. The MBE participation percentage given by Groves was only 4.15%, a number which was not documented as required by the Bid Specifications. The second lowest bid received (approximately $22,000 higher) contained an MBE participation level of 10%. The third lowest bid contained an MBE participation level of 22%.

Fulco conditionally awarded the contract for the Airport Project to Groves provided that it make a good faith effort to increase its MBE participation pursuant to the federal regulations. Approximately one month later Groves had not increased its 4.15% MBE participation figure. At its next regularly scheduled Board Meeting, Fulco determined that Groves had not used good faith efforts during that month to increase its MBE participation, and voted that Groves had not satisfied the condition for award of the contract to it.

Thereafter, Fulco conditionally awarded the contract to the second lowest bidder which had an MBE participation level of 10% in its original bid. As with Groves, the award was conditioned upon that bidder's good faith efforts to increase its MBE participation. Two days following the conditional award of the contract, that bidder in-

creased its MBE participation from 10% to 16%. Fulco determined that a 6% increase in two days constituted a good faith effort on the part of the second lowest bidder, and although it did not achieve the 20% MBE goal, Fulco awarded the contract to the second lowest bidder with the approval of the FAA.

Although Groves received the Invitation To Bid referring to the DOT Regulations and the Fulco 1982 Program and attended the Pre-Bid Conference as early as May, 1982, it did not raise any objection to the DOT Regulations or the Fulco Program. Groves' original application in the District Court for a temporary restraining order, which was denied, and the initial complaint Groves filed in this case in August, 1982 did not raise any objection to the validity of Fulco's Program or the DOT Regulations. To the contrary, Groves initially sought a temporary restraining order and then sought damages against Fulco based on its claim that it had complied with the MBE Program and DOT Regulations. It was not until December, 1982, after the Airport Project was underway, that Groves for the first time sought damages against Fulco based on a challenge to the validity of the 1982 MBE Program and the DOT Regulations. Groves at no time sought an injunction against Fulco based upon a claim that Fulco's Program and the DOT Regulations were invalid.

Because Groves was challenging the constitutionality of the DOT Regulations, the District Court ordered the DOT and the Secretary of the DOT joined as "Federal Defendants" to defend the validity of the DOT Regulations. [Groves' Appendix at 34c-38c]. The District Court held the DOT Regulations were invalid. *S.J. Groves & Sons Co. v. Fulton County*, 696 F. Supp. 1480, 1495 (N.D. Ga. 1987). The District Court also held that Fulco's 1982 MBE Program, which was based upon and required by the DOT Regulations, violated the Georgia low-bid statute, O.C.G.A. § 36-10-2, Title VI of the Civil Rights Act of 1964, and the Equal Protection Clause of the Fourteenth

Amendment. [Groves' Appendix at 2d-6d]. The District Court found that reliance on a valid federal regulation would have provided a defense against Groves' claims, since a valid federal regulation would preempt the Georgia low-bid statute and the State Constitution and would be consistent with Title VI and the Fourteenth Amendment. [*Id.* at 2d]. The District Court held that because the DOT Regulations were invalid, reliance on the Regulations by Fulco did not provide it with a defense to Groves' claim for monetary damages for the alleged violation of the low-bid statute by adoption of the 1982 MBE Program. [*Id.* at 2d; 33c].

On appeal the Eleventh Circuit reversed the ruling of the District Court, holding that the DOT Regulations were authorized by Congress and the District Court applied the incorrect standard of strict scrutiny. *S.J. Groves & Sons Co. v. Fulton County*, 920 F.2d 752, 764-767 (11th Cir. 1991). This holding is the subject of Groves' Petition for Writ of Certiorari filed in this case on April 8, 1991, No. 90-1562.

The Eleventh Circuit also decided an important question of federal law that conflicts with applicable decisions of this Court and other courts of appeal. The Eleventh Circuit, despite finding that the DOT Regulations were authorized by Congress, held that Fulco as a local government recipient of federal funds under a federal grant may be liable in monetary damages to Groves solely based on its good faith reliance on and compliance with the presumptively valid DOT Regulations. The Eleventh Circuit held that this "good faith reliance defense" "is foreclosed by the recent Supreme Court decision in *American Trucking Ass'ns v. Smith*, ___ U.S. ___, 110 S.Ct. 2323, 110 L.Ed.2d 148 (1990)." *S.J. Groves*, 920 F.2d at 768. It is this far reaching decision which is the subject of Fulco's Cross-Petition.

EXISTENCE OF JURISDICTION BELOW

Jurisdiction in the District Court was based on 28 U.S.C. §§ 1331 and 1332(a). The Eleventh Circuit had appellate jurisdiction pursuant to 28 U.S.C. § 1291, providing for appeals from final decisions, and 28 U.S.C. § 1292(b), providing for interlocutory appeals.

REASONS FOR GRANTING THE WRIT

SUMMARY

Fulco, as a local government recipient of federal financial assistance pursuant to a federal grant from the United States under the AADA, should not be held liable in damages to a private party based solely on its good faith reliance upon and compliance with presumed to be valid federal regulations that are authorized by Congress, if those federal regulations are subsequently held invalid.

The decision of the Eleventh Circuit with respect to Fulco's good faith reliance defense is based on an erroneous application and interpretation of this Court's decision in *American Trucking Associations v. Smith*, 495 U.S. ___, 110 L.Ed.2d 148 (1990), and is in conflict with controlling decisions of this Court and other courts of appeal protecting the reasonable reliance of a party on prior law, even when such protection requires allowing a statute which is subsequently held invalid to remain in effect for a limited period of time. *E.g., Heckler v. Matthews*, 465 U.S. 728 (1984), and cases cited therein; *Lemon v. Kurtzman*, 411 U.S. 192 (1973); *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107 (1971); *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970); *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71 (1953); *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1939); *Rosebud Sioux Tribe v. State of South Dakota*, 900 F.2d 1164 (8th Cir. 1990); *Kirschberg v. Feenstra*, 609 F.2d 727 (5th Cir. 1979).

The Eleventh Circuit's ruling on Fulco's good faith reliance defense is also in conflict with decisions of this Court and other courts of appeal recognizing a defense to a reverse discrimination challenge based on good faith compliance with presumed to be valid federal regulations in obtaining approval of an affirmative action plan by a federal agency. *See, e.g., United Jewish Organization v. Carey*, 430 U.S. 144 (1977); *Valentine v. Smith*, 654 F.2d 503, 509 (6th Cir. 1981), *cert. denied*, 102 S.Ct. 1972 (1982); *Southern Illinois Builders Association v. Ogilvie*, 471 F.2d 680 (7th Cir. 1972); *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159, 175 (3rd Cir.), *cert. denied sub nom, Contractors Association v. Hodgson*, 404 U.S. 854 (1971).

The effect of the Eleventh Circuit's ruling has significant and far reaching ramifications. If Fulco is liable in damages based on its good faith compliance with congressionally authorized and presumptively valid federal regulations, then every local and state government that is considering entering into any grant agreement with the federal government and is required to comply with federal regulations would always be subject to the risk of liability in monetary damages for its mere compliance with the federal regulations. Moreover, such a ruling would mean that every governmental entity which complied with the DOT Regulations and entered into a grant agreement with the DOT, affecting hundreds of millions of dollars in contracts, would be at risk for monetary damages for complying with those Regulations.

If a local government as a recipient of federal funds under a federal grant can be liable in monetary damages to a private party for merely complying with federal regulations authorized by Congress that are subsequently held invalid, it would have a detrimental impact on the ability of Congress to use the Spending Power to further any broad national policy objectives by conditioning receipt of federal monies upon compliance by local or state gov-

ernments with federal statutory and administrative directives. Such a ruling in this case will jeopardize this technique to induce governments and private parties to cooperate voluntarily with federal policy. Worthwhile projects will go unfunded because local and state governments will be extremely reluctant to enter into federal grant agreements knowing that they could be subject to monetary damages if the terms and conditions are subsequently held invalid.

DISCUSSION

I. Fulco As A Recipient Of Federal Funds Under A Federal Grant Should Not Be Liable In Monetary Damages To A Private Party For Its Good Faith Compliance With Presumed To Be Valid Federal Regulations That Are Subsequently Held Invalid

Groves, a disappointed bidder, is not entitled to recover monetary damages from Fulco, a local government recipient pursuant to a federal grant agreement, for an alleged violation of the Georgia low-bid statute, based solely on Fulco's good faith compliance with presumed to be valid federal regulations authorized by Congress, when those regulations are subsequently held invalid. The Eleventh Circuit erred in holding that Fulco's good faith reliance defense was foreclosed by this Court's decision in *American Trucking*, 110 L.Ed.2d 148. The Eleventh Circuit's decision is in conflict with controlling decisions of this Court and other courts of appeal which establish that Fulco was entitled to rely on the DOT Regulations. The Eleventh Circuit's decision is also in conflict with decisions of this Court and other courts of appeal which recognize that a local government such as Fulco can rely on the fact that it complied in good faith with federal regulations in obtaining approval of an affirmative action plan by a federal agency in defense to a reverse discrimination challenge.

A. The DOT Regulations Are Presumptively Valid

Federal Statutes are presumptively valid unless it is shown that the statute in question bears no rational relationship to a legitimate purpose. *See, e.g., United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 174-176 (1980); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *United States v. Middleton*, 690 F.2d 820, 822 (11th Cir. 1982). Similarly, federal regulations enacted by federal administrative agencies pursuant to federal statutes, as well as the actions of federal administrative agencies, are presumptively valid until proven otherwise. *See, e.g., Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 185-186 (1935); *Alabama Nursing Home Association v. Harris*, 617 F.2d 388, 393 (5th Cir. 1980); *Maryland-National Capital Park & Planning Commission v. Lynn*, 514 F.2d 829, 834 (D.C. Cir. 1975).

B. The DOT Regulations Should Remain In Effect To Protect Fulco, Even If Held Invalid, Because Of Fulco's Reasonable And Good Faith Reliance On Their Validity

1. Fulco's Reasonable And Good Faith Reliance Upon The DOT Regulations Should Be Protected

This Court has repeatedly recognized "in a number of contexts, *the legitimacy of protecting reasonable reliance on prior law even when that requires allowing an unconstitutional statute to remain in effect for a limited period to time.*" *Heckler*, 465 U.S. at 746 (emphasis added); *see Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87-89 (1982) (plurality opinion); *Buckley v. Valeo*, 424 U.S. 1, 142-143 (1976) (per curiam); *Chevron*, 404 U.S. at 106-107; *see also Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 718-723 (1978). The Court in *Heckler* held that the "protection of reasonable reliance interests" in a statute

later declared invalid is a "legitimate governmental objective." 465 U.S. at 746.

Applying this principle to the facts of this case, the following is undisputed: Fulco's good faith, reasonable reliance on the DOT Regulations; the presumption of validity attached to the DOT Regulations which the District Court and Eleventh Circuit held were authorized by Congress; and the particular relations and conduct of rights which became vested and were acted upon accordingly between Fulco and the United States in connection with the DOT Regulations and the Federal Grant.

It also is well-established by this Court that where a statute or regulation is held unconstitutional, its existence before it has been so declared is an operative fact which cannot justly be ignored. *E.g., Rockaway News Supply,* 345 U.S. at 77; *Chicot County,* 308 U.S. at 374; *see Kurtzman,* 411 U.S. at 198-199 (Statutory made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct); *Kolodziejski,* 399 U.S. at 213-214; *Cipriano,* 395 U.S. at 706. The Eleventh Circuit's decision is in conflict with this well-established doctrine.

The principle well stated in *Chicot County* is applicable in this case:

> The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. [cit. omitted]. It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. *The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored.* The past cannot always be erased by a new judicial

> declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects, — with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination.

308 U.S. at 374 (emphasis added); *see Rosebud Sioux Tribe*, 900 F.2d at 1172-1173 (applying *Chicot County*).

In *Rockaway News Supply*, the Court applied the principle as follows:

> There are two obstacles in the way of the Board's complete disregard of this contract. The first is that, even if inclusion of a forbidden provision is enough to justify the Board in setting it aside as to the future, *it does not follow that it can be wholly ignored in judging events that occurred before it was set aside.* It is one thing for the Board to say that the parties should not go on under such a contract; *it is another to say that no effect whatever may be given to a contract negotiated in good faith by the union and the employer which both believed to be valid and operative, to which both were conforming their conduct, and which no authority had yet held void.*
>
> Even where a statute is unconstitutional and hence declared void as of the beginning, this Court has held that its existence before it has been so declared is not to be ignored.

345 U.S. at 77 (emphasis added). This principle should be applied to protect Fulco's reasonable reliance on the DOT

Regulations, including allowing those Regulations to remain in effect for a limited period of time prior to any ruling declaring them invalid. Similar to the contract discussed in *Rockaway News Supply*, Fulco's contractual relationship with the DOT, the Federal Grant and the DOT Regulations are operative facts which cannot be ignored. The effect of Fulco's reliance should be considered with respect to the particular relations and conduct of the rights which have vested and been acted upon accordingly between the United States and Fulco.

This principle is especially pertinent to this case because of the far reaching ramifications to the doctrine of federalism and the legitimate broad policy objectives of the Spending Power of a decision holding a local or state government liable in monetary damages for its compliance in good faith with federal regulations subsequently held invalid. *See, e.g., South Dakota v. Dole*, 483 U.S. 203, 206-207 (1987) (Congress may further broad policy objectives by conditioning receipt of federal monies upon compliance by recipient with federal statutory and administrative objectives); *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980).

The Court in *Kurtzman* recognized "one of the first principles of constitutional adjudication — the basic presumption of the constitutional validity of a duly enacted state or federal law", and held that the propriety of the relief afforded "must be measured against the totality of circumstances and in light of the general principle that, absent contrary direction, state officials and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith, and by no means plainly unlawful." 411 U.S. at 208-209.

In *Kirschberg*, 609 F.2d 727, the former Fifth Circuit directly applied the principle. It held that a state law violated equal protection, but applied its ruling only prospectively because of the substantial inequitable re-

sults, injustice or hardship if it applied its decision *in that case* retroactively, *citing Chicot County* and other cases. *Id.* at 735-736.

2. *The DOT Regulations' Preemption Of The Georgia Low-Bid Statute Should Remain In Effect*

The District Court held and all parties agree that to the extent any state law conflicts with the federal regulations, it is preempted. Fulco's reliance on the federal regulations includes by definition reliance on the preemptive effect those regulations would have with regard to any conflicting state statute.

The DOT Regulations, which the Eleventh Circuit and District Court held were rooted in congressional authority, 920 F.2d at 764-765, and 696 F. Supp. at 1483-1484, even if they are subsequently determined to be invalid, still should preempt any conflicting state statute, at least until they are declared invalid. *See, e.g., Heckler,* and other cases cited *supra* at pp. 12-16. Because the Fulco MBE Program was adopted solely in compliance with presumed to be valid federal regulations, which were mandated pursuant to a valid congressional act and approved by appropriate federal authorities, it preempts any conflicting provisions of state law under the Supremacy Clause of the Constitution, Article VI, cl. 2. *See, e.g., Fidelity Federal Savings & Loan Association v. de la Cuesta,* 458 U.S. 141, 153 (1982); *Public Utilities Commission v. United States,* 355 U.S. 534, 544 (1958); *Contractors Association of Eastern Pennsylvania,* 442 F.2d at 166; *M.C. West, Inc. v. Lewis,* 522 F. Supp. 338, 349 n. 15 (M.D. Tenn. 1981).

"Legislative . . . regulations are 'issued by an agency pursuant to statutory authority . . . . Such rules have the force and effect of law.'" *Batterton v. Francis,* 432 U.S. 416, 425-26 & n. 9 (1977). 49 C.F.R. Part 23 is a substantive or legislative rule which had the force and effect of law since

it was issued pursuant to congressional authority, at least until it is held invalid. Fulco was entitled to rely in good faith on the regulations having the force and effect of law and the presumption of validity at the time it entered into the Grant Agreement. In addition, Fulco was entitled to rely on the preemptive effect of the regulations on state laws, including the Georgia competitive bid statute, when it entered into the Grant Agreement.

A determination that the regulations are invalid should only apply prospectively to a local government which in good faith relies upon the validity of the regulations and enters into a grant agreement. Otherwise, every local and state government which enters into any grant agreement with the federal government and is required to comply with federal regulations always would be at risk that subsequently it could be held liable in damages for its mere compliance with presumed to be valid federal regulations that are later held to be invalid. Moreover, if preemption does not apply during the time prior to the declaration of invalidity, then every governmental entity which complied with the DOT Regulations and entered into a grant agreement with the DOT, affecting hundreds of millions of dollars in contracts, potentially is at risk for complying with the Regulations since their inception.

3. *Holding Fulco Liable In Damages For Its Compliance With The DOT Regulations Would Be Inequitable*

Substantial unjust and inequitable results will accrue to Fulco, which justifiably and reasonably relied on the DOT Regulations, if a holding of invalidity is applied retroactively and the Regulations are denied any preemptive effect prior to the declaration of invalidity. *See, e.g., Chevron*, 404 U.S. at 107-109; *American Trucking*, 110 L.Ed.2d at 161-164, 168-171 (plurality opinion), and cases cited therein. Fulco faces liability in damages for

merely complying with the DOT Regulations. There also potentially will be substantial inequitable and unjust results for local and state governments throughout the United States who have complied in good faith with the DOT Regulations since their adoption *in 1981.*

The substantial injustice to Fulco is further demonstrated by the activities of Groves. The Fulco Airport Project bid materials contained references to the required compliance with 49 C.F.R. Part 23. Groves made no objection to such compliance. It was not until December, 1982, approximately four months after the original complaint was filed and after Fulco had awarded the contract to the second lowest bidder and construction was underway that Groves raised for the first time any of the constitutional and other challenges to the validity of the regulations and the Fulco MBE Program.

C. *Holding A Local Government Liable In Damages For Its Compliance With Federal Regulations Pursuant To A Grant Agreement Would Have A Detrimental Impact*

Pursuant to Article I, § 8, cl. 1 of the Constitution, Congress attaches conditions on the receipt of federal funds and employs the Spending Power to further national policy objectives. As well stated in *Fullilove,* 448 U.S. at 474:

> Congress has frequently employed the Spending Power to *further the broad policy objectives* by conditioning receipt of federal monies upon compliance by the recipient with federal statutory and administrative directives. This Court has repeatedly upheld against constitutional challenge the use of this technique to *induce* governments and private parties to cooperate voluntarily with federal policy. [cases omitted].

(emphasis added). *E.g., Dole*, 483 U.S. at 206-207; *Lau v. Nichols*, 414 U.S. 563 (1974); *Stewart Machine Co. v. Davis*, 301 U.S. 548 (1937).

If a local or state government can be liable in monetary damages for merely complying with federal regulations which are subsequently held invalid, there will be a detrimental impact on the ability of Congress to use the Spending Power to further broad national policy objectives by conditioning receipt of federal monies upon compliance by local or state governments with federal statutory and administrative directives. The Eleventh Circuit's ruling in this case jeopardizes this technique to induce governments and private parties to cooperate voluntarily with federal policy. Worthwhile projects will go unfunded because local and state governments will be reluctant to enter into federal grant agreements knowing that they could be subject to monetary damages if the terms and conditions are subsequently held invalid.

The ramifications of holding Fulco liable in this case would be to hold "those [Fulco] charged with executing state legislative directives to the peril of having their [Fulco] arrangements unraveled if they act before there has been an authoritative judicial determination that the governing legislation is constitutional." *Kurtzman*, 411 U.S. at 207. This would mean that local government officials would have to "stay their hands until newly enacted state [or federal] programs are 'ratified' by the federal courts, or risk the draconian, retrospective decrees should the legislation fall." *Id.* at 207-208.

In *Guardians Association v. Civil Service Commission of the City of New York*, 463 U.S. 582, 603 n. 24 (1983), this Court stated:

> [T]he Federal Government can always sue any recipient who fails to comply with the terms of the grant agreement and force the violator to repay misspent funds. . . . *But it is an entirely*

> *different matter to subject the recipient to open-ended liability to private plaintiffs. . . .* Congress may have felt that the salutary deterrent effect of a compensatory remedy was outweighed by the possibility that such a remedy would dissuade potential recipients from participating in important federal programs.

(emphasis added). The Court in *Guardians* refers to the analogous *"Pennhurst* presumption that only limited injunctive relief should be granted as a remedy for unintended violations of statutes passed pursuant to the spending power." *Id.* at 602 & n. 23. If a recipient cannot be liable in damages for violating a statute, surely it should not be liable for *complying* with the statute if it is later held invalid.

D. The Eleventh Circuit's Decision Conflicts With Decisions Of This Court And Other Federal Courts Permitting Good Faith Reliance In Defense To A Reverse Discrimination Challenge

A local government such as Fulco can rely on the fact that it complied in good faith with presumed to be valid federal regulations in obtaining approval of an affirmative action plan by a federal agency in defense to a reverse discrimination challenge. *See, e.g., United Jewish Organization,* 430 U.S. 144; *Milwaukee County Pavers Association v. Fiedler,* 710 F. Supp. 1532, 1545-1547 (W.D. Wis. 1989), *modified in part,* 731 F. Supp. 1395, 1409-1410 (1990), *aff'd,* 922 F.2d 419 (7th Cir. 1991); *Valentine,* 654 F.2d at 509, *cert. denied,* 102 S.Ct. 1972 (state university entitled to rely on findings by a federal agency of discrimination in adopting affirmative action plan in compliance with HEW); *Southern Illinois Builders Association,* 471 F.2d 680 (upheld Illinois' affirmative action plan where complying with federal statutes and directives in federally funded projects); *Eastern Pennsylvania,* 442 F.2d at 175, *cert. denied sub nom.,*

Contractors Association v. Hodgson, 404 U.S. 854 (1971); *see also Marvin v. Alston Independent School District*, 714 F.2d 1348, 1356 (5th Cir. 1983) (Plaintiff is not entitled to recover monetary damages against city school district when it attempts in good faith to adhere to federal guidelines, even if Court subsequently determines that it did not comply with necessary procedures); *Associated General Contractors of Massachusetts, Inc. v. Altshuler*, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974) (upheld Massachusetts' affirmative action plan adopted in compliance with Executive Order 11246 requiring contractors to accept federal agency approved affirmative action plan imposing bid conditions on contractors).

This Court recognized that Title VII establishes a complete immunity or "good faith" defense for employer conduct shown to have been undertaken in good faith, in conformity with, and in reliance on a written interpretation or opinion of the EEOC. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 423 n. 17 (1975) (*See* 42 U.S.C. § 2000e-12(b), Title VII, § 713).[3] Similarly, Fulco is entitled to a defense for its good faith reliance on and compliance with written regulations promulgated by the DOT. The EEOC states it is "fundamentally unfair" to expose those subject to Executive Order to risks of liability under Title VII when they act in compliance with government requirements. 44 Fed. Reg. at 4425.

In addition, good faith compliance by an employer with an affirmative action plan required by federal regulations constitutes a defense to a reverse discrimination

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[3] The good faith reliance defense also has been codified under the Equal Credit Opportunity Act. 15 U.S.C. § 1691e(e). This statute provides an absolute defense against liability for "any act done or omitted in good faith in conformity with any official rule, regulation . . . , notwithstanding that after such act or omission has occurred, such rule, regulation . . . is . . . determined by judicial or other authority to be invalid . . . ."

challenge. *See, e.g., Setser v. Novack Investment Co.*, 657 F.2d 962, 968 (8th Cir. 1981); *Sisco v. J.S. Alberici Construction Co.*, 655 F.2d 146 (8th Cir. 1981).

In *United Jewish Organizations ("UJO")*, this Court concluded that the use of racial criteria by the State of New York, in attempting to comply with the Voting Rights Act and to secure the approval of the Attorney General, did not violate the Fourteenth Amendment. The Court affirmed the judgment of the court of appeals that New York's plan was not subject to challenge because it was done in compliance with the Voting Rights Act and with the approval of the Attorney General. 430 U.S. at 164-165.

In *Eastern Pennsylvania*, the Court held that Executive Order 11246, the federal agency interpretation of the Order and implementation of an affirmative action plan, as a precondition to federally assisted construction projects in Pennsylvania, was valid as being within the implied authority of the President and the Department of Labor. 442 F.2d at 171, 174. The affirmative action plan was approved by the Attorney General. *Id.* Although in *Eastern Pennsylvania*, the President by Executive Order acted without a congressional mandate as in the present case, the Court upheld the federal imposition of the affirmative action requirement on federally assisted construction contracts. 442 F.2d at 171, 174-175.

Moreover, the only reported case that considered the validity of 49 C.F.R. Part 23 as that regulation existed at the time of the approval of the Fulco MBE Program in April, 1982 was *M.C. West*, 522 F. Supp. at 338. In *M.C. West*, the Court expressly upheld the validity of 49 C.F.R. Part 23 against similar constitutional and state law challenges.[4]

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[4] In *Central Alabama Paving, Inc. v. James*, 449 F. Supp. 629 (M.D. Ala. 1980), the Court held invalid the DOT's MBE Regulation prior to its

Significantly, the United States Department of Justice, similar to the Attorney General in *Eastern Pennsylvania* and *UJO*, actively supported and defended the validity of 49 C.F.R. Part 23 as a participant in *M.C. West*. In fact, the Attorney General specifically approved and concurred in 49 C.F.R. Part 23 on July 17, 1981. [Fulco's Appendix at 1b]. Fulco, similar to the non-federal governments in *UJO* and *Eastern Pennsylvania*, was entitled to rely on the opinion of the Attorney General of the United States supporting and affirming the validity of 49 C.F.R. Part 23 when it entered into the Grant Agreement with the U.S. DOT in September, 1982.

Therefore, Fulco should not be held liable in monetary damages for its good faith compliance with presumed to be valid DOT Regulations, especially where the Regulations were rooted in congressional authority, and were declared valid by the Attorney General, the Department of Justice, and the only federal court to have considered their validity as they existed at the time Fulco entered into the Grant Agreement with the DOT.

E. The "Choice" Of Foregoing Federal Funds Is Not Relevant

The Eleventh Circuit remarked that "we have trouble allowing a local government to plead reliance on federal regulations when the local government *voluntarily* relied on those regulations." *S.J. Groves*, 920 F.2d at 767. The evidence shows that Fulco had no other alternative but to obtain federal funds to accomplish the Airport Project based on the circumstances which existed at that time and therefore to comply with the federal regulations. Fulco pursuant to state and local laws is restricted

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amendment in 1981 to eliminate the conclusive presumption that contractors who failed to comply with the MBE goals are ineligible for consideration. *Id.* at 632.

and limited in the way it can raise and spend funds, and the time it takes to do so.

The determination to forego federal grants does not in reality provide much of a free "choice" to local and state governments who need to fund worthwhile projects. This Court in *Fullilove*, 448 U.S. 448, and *Dole*, 483 U.S. 203, did not consider relevant the fact the states enjoyed the "option" or "choice" of foregoing federal funds. *See Milwaukee County Pavers Association v. Fiedler*, 710 F. Supp. 1532, 1546 (W.D. Wis. 1989), *aff'd*, 922 F.2d 419 (7th Cir. 1990).

II. American Trucking Does Not Hold That A Local Government Could Be Liable In Monetary Damages For Good Faith Reliance Upon Federal Regulations

The Eleventh Circuit incorrectly held that *American Trucking*, 110 L.Ed.2d 148, "foreclosed" Fulco's good faith reliance defense. The specific issue in *American Trucking* was whether the constitutional decision in *American Trucking Associations v. Scheiner*, 483 U.S. 266 (1987), in which the Court held that a state tax law violated the Commerce Clause, should be applied retroactively to the parties before the Court.

The Eleventh Circuit based its holding on the four dissenters' opinion and Justice Scalia's concurring opinion. The Eleventh Circuit in effect created a purported "majority" of the Court in adoption of what amounts to "anticipatory *stare decisis*". *See* 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.402[2] (2d ed. 1991).

Federal courts of appeal have a duty to follow the *majority opinions* of this Court. *E.g., United States v. Vida*, 370 F.2d 759, 766 (6th Cir. 1966); *Ferina v. United States*, 340 F.2d 837-839 (8th Cir. 1965). In *American Trucking*, there was no *majority opinion*. The Eleventh Circuit gave undue controlling precedential weight to the dissenting opinion. Federal courts of appeal, as inferior courts, cannot follow the dissenting opinions of the

Supreme Court. *E.g., Marino v. Bowers*, 657 F.2d 1363, 1368 (3rd Cir. 1981) ("Were we to require individuals to be guided in their actions by dissenting opinions we would stand the system of *stare decisis* on its head"); *United States v. Barbera*, 514 F.2d 294, 300 (2nd Cir. 1975); *United States v. Harpole*, 263 F.2d 71, 80 (5th Cir. 1959).[5]

The fact that there was no clear majority opinion in *American Trucking* entitled to *stare decisis* treatment is demonstrated by the recent decisions of this Court in *Ashland Oil, Inc. v. Caryl*, 111 L.Ed.2d 734 (1990); and *National Mines Corp. v. Caryl*, 111 L.Ed.2d 740 (1990). In these two recent decisions, this Court recognized its division on the issue of retroactive application of its constitutional decisions by analyzing the issue under both the plurality and dissenting views in *American Trucking*. This Court did not find either the plurality or dissenting view controlling.

The Eleventh Circuit's interpretation of the *American Trucking* dissent and Justice Scalia's concurrence appears to apply the old void *ab initio* principle. The Eleventh Circuit concluded those five Justices in *American Trucking* would hold that if the DOT Regulations are unconstitutional, they are void from the beginning and void when Fulco relied on them. The void *ab initio* principle, once applied by this Court in *Norton v. Shelby County*, 118 U.S. 425 (1886), however, has been rejected and abandoned by this Court. As well stated by this Court in *Lemon v. Kurtzman:*

> Consequently, our holdings in recent years have emphasized that the effect of a given constitutional ruling on prior conduct "is subject to no set 'principle of absolute retroactive invalidity'

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[5] Likewise, a judgment or affirmance of the Supreme Court rendered by an equally divided Court is without force as precedent. *E.g., Ohio v. Price*, 364 U.S. 263, 264 (1960); *Neil v. Biggers*, 409 U.S. 188, 192 (1972).

> but depends upon a consideration of 'particular relations . . . and particular conduct . . . of rights claimed to have become vested, of status, of prior determinations deemed to have finality'; and 'of public policy in the light of the nature both of the statute and of its previous application.' " *Linkletter supra* at 627, 14 L.Ed.2d 601, quoting from *Chicot County Drainage Dist., supra*, at 374, 84 L.Ed.2d 329. However appealing the logic of *Norton* may have been in the abstract, its abandonment reflected our recognition that *statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing a doctrine of nonretroactivity.*

411 U.S. at 198-199 (emphasis added). The DOT Regulations were the "hard facts" on which Fulco relied in entering into the Grant.

The Eleventh Circuit states: "We are without power to declare them [DOT Regulations] constitutional 'in the interim'. . . . There is simply no authority on which to do this." *S.J. Groves*, 920 F.2d at 768. In making this statement, the Eleventh Circuit did not consider the decisions in which this Court recognized the legitimacy of protecting good faith and reasonable reliance on prior law, "even when that requires allowing an unconstitutional statute to remain in effect for a limited period of time". *See, e.g., Heckler*, 465 U.S. at 746, and cases cited therein and *supra* at pp. 12-16.

The Eleventh Circuit's creation of a purported "majority" from the four dissents and one concurrence in *American Trucking* violates the rule of this Court that "when no single rationale commands a majority of the members of the United States Supreme Court, the hold-

ing of the Court may be viewed as that position taken by those members who concurred in the judgment on the narrowest grounds." *E.g., Marks v. United States*, 430 U.S. 188, 193 (1977); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 464-465 n. 9 (1988). Justice Scalia concurred in the judgment of the plurality in *American Trucking*, which held that the *Scheiner* decision did not apply retroactively based on the retroactivity doctrine enunciated in *Chevron*. The narrowest ground for the non-retroactivity holding in *American Trucking* may be viewed as that position taken from the plurality and concurrence. The position of the dissent should not be viewed as the holding of the Court, which can then be used as *controlling* precedent to "foreclose" Fulco's good faith reliance defense.

Moreover, the *American Trucking* dissent makes a distinction between "remedy" cases (i.e., cases concerning the relief that a federal court should award when applying a new law), which the *Chevron* line of cases fall, and "choice of law" cases (i.e., cases concerning the application of a new constitutional or statutory rule), which *American Trucking* is an example. Fulco's good faith reliance defense involves a "remedy" case concerning the relief that a federal court should award. The *American Trucking* dissent recognizes that consideration of reliance can be appropriate in the "remedy" cases. 110 L.Ed.2d at 189. The Eleventh Circuit did not address this distinction.

Furthermore, the dissent in *American Trucking* is distinguishable from the present case and not controlling. First, *American Trucking* involved the issue of whether this Court's decision declaring a *state* tax law unconstitutional should be applied retroactively to the parties in another case. This case involves the issue of whether a local government may be held liable in damages for its mere good faith reliance on federal regulations. It does not deal with the issue of whether a constitutional decision of this Court should be applied retroactively. Second,

in *American Trucking*, the State of Arkansas enacted the invalid tax statute and collected the taxes which were later determined to be invalid. Retroactive application of *Scheiner* would result in Arkansas being liable to the taxpayers for refunds of the wrongfully collected taxes.

In the present case, the equitable considerations are much greater. Fulco played no part in enacting the federal regulations. Retroactive application of a ruling holding the regulations invalid would result in Fulco being liable out of its own funds as damages based on its mere compliance with presumptively valid federal regulations, which it was contractually obligated to follow pursuant to a federal grant agreement.

The Eleventh Circuit's statement that it would have "difficulty simply declaring the regulations unconstitutional, and then not applying that declaration even to the parties before the court" because it would approach an "advisory opinion" is in error. This Court has repeatedly announced new rules for the future only, refusing to apply them even to the parties before the Court. *American Trucking*, 110 L.Ed.2d at 187 n. 11, and cases cited therein; *Allen v. Board of Elections*, 393 U.S. 544 (1969); *Linkletter v. Walker*, 381 U.S. 618, 621-622 (1965); *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964).

In *England*, this Court held that its opinion resolved an ambiguity in prior law and therefore it would be unfair to apply the new rule to the parties in that case. "On the record in the instant case, the rule we announce today would call for affirmance of the District Court's judgment. But we are unwilling to apply the rule against these appellants." 375 U.S. at 422-423.

In *Allen*, this Court applied "purely prospectively" to the parties its determination that certain amendments to Mississippi's elections laws violated the Section 5 preclearance procedures of the 1965 Voting Rights Act be-

cause "[t]hese Section 5 coverage questions involve complex issues of first impression — issues subject to rational disagreement." 393 U.S. at 571-572. *See also Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932).

CONCLUSION

For all the foregoing reasons, Cross-Petitioner Fulton County, Georgia respectfully requests that the Court grant its Cross-Petition for a Writ of Certiorari.

DATED: May 8, 1991
Atlanta, Georgia

Respectfully submitted,

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90-1737

No. _____

Supreme Court, U.S.
FILED
MAY 8 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FULTON COUNTY, GEORGIA,
Cross-Petitioner,
v.
S.J. GROVES & SONS COMPANY AND
JASPER CONSTRUCTION COMPANY,
Cross-Respondents.

APPENDIX OF CROSS-PETITIONER, FULTON COUNTY, GEORGIA

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May 1991

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A. Grant Agreement Between Fulton County, Georgia And The United States Department Of Transportation For The Fulton County Airport Project..... 1A

B. Statement Of The United States Attorney General Dated July 17, 1981 Re: Approval Of Department Of Transportation Minority Business Enterprise Regulation, As Amended 1B

Note: Pursuant to Rule 12.3 of the Rules of this Court, Cross-Petitioner Fulton County, Georgia references the materials printed in the Appendix to the original Petition for Writ of Certiorari filed by S.J. Groves & Sons Company and Jasper Construction Company, at App. 1a - 1f.

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

GRANT AGREEMENT

PART 1 - OFFER

Date of Offer: September 25, 1981
Fulton County-Brown Field Airport
Atlanta, Georgia
Project No. 5-13-0007-06
Contract No. DTFA06-81-A-80084

To: Fulton County, Georgia (herein referred to as the "Sponsor")

From: The United States of America (acting through the Federal Aviation Administration, herein referred to as the "FAA")

WHEREAS, the Sponsor has submitted to the FAA a Project Application (herein called an Application for Federal Assistance) dated September 11, 1981, for a grant of Federal funds for a project for development of the Fulton County-Brown Field Airport (herein called the "Airport"), together with plans and specifications for such project, which Application for Federal Assistance, as approved by the FAA is hereby incorporated herein and made a part hereof; and

WHEREAS, the FAA has approved a project for development of the Airport (herein called the "Project") consisting of the following-described airport development:

Overlay and mark Runway 8R-26L; overlay parallel and connecting taxiway to Runway 8R-26L and connecting taxiway to Runway 14-32; Groove Runway 8R-

26L all as more particularly described in the property map and plans and specficiations incorporated in the said Application for Federal Assistance.

NOW THEREFORE, pursuant to and for the purpose of carrying out the provisions of the Airport and Airway Development Act of 1970, as amended (49 U.S.C. 1701 et seq.), and in consideration of (a) the Sponsor's adoption and ratification of the representations and assurances contained in said Application for Federal Assistance, and its acceptance of this Offer as hereinafter provided, and (b) the benefits to accrue to the United States and the public from the accomplishment of the Project and the operation and maintenance of the Airport as herein provided, THE FEDERAL AVIATION ADMINISTRATION, FOR AND ON BEHALF OF THE UNITED STATES, HEREBY OFFERS AND AGREES to pay, as the United States share of the allowable costs incurred in accomplishing the Project, ninety (90%) from funds appropriated under the Airport and Airway Development Act of 1970, as amended.

This Offer is made on and subject to the following terms and conditions:

1. The maximum obligation of the United States payable under this Offer shall be $1,197,014.

2. The Sponsor shall:

   a. begin accomplishment of the Project within sixty (60) days after acceptance of this Offer or such longer time as may be prescribed by the FAA, with failure to do so constituting just cause for termination of the obligations of the United States hereunder by the FAA;

b. carry out and complete the Project without undue delay and in accordance with the terms hereof, the Airport and Airway Development Act of 1970, as amended, and the Regulations of the FAA (14 CFR Part 152) in effect as of the date of acceptance of this Offer; which Regulations are hereinafter referred to as the "Regulations";

c. carry out and complete the Project in accordance with the plans and specifications and property map, incorporated herein, as they may be revised or modified with the approval of the FAA;

d. submit all financial reports on an accrual basis and if records are not maintained on an accrual basis, reports may be based on analysis or records or best estimates as required by the Regulations;

e. monitor performance under the Project to assure that time schedules are being met, projected work units by time period are being accomplished, and that other performance goals are being acheived as established by the Regulations.

3. The allowable costs of the project shall not include any costs determined by the FAA to be ineligible for consideration as to allowability under the Regulations.

4. Payment of the United States share of the allowable project costs will be made pursuant to and in accordance with the provisions of the Regulations. Final determination of the United States share will be based upon the final audit of the total amount of

allowable project costs and settlement will be made for any upward or downward adjustments to the Federal share of costs. The grant closeout requirements will be in accordance with the Regulations.

5. The sponsor shall operate and maintain in the airport as provided in the Application for Federal Assistance incorporated herein and specifically covenants and agrees in accordance with its Assurance 20 in Part V of said Application for Federal Assistance, and Section 30 of the Airport and Airway Development Act, as amended, that in its operation and the operation of all facilities thereof, neither it nor any person or organization occupying space or facilities thereon will discriminate against any person by reason of race, color, creed, national origin or sex in the use of the facilities provided for the public on the airport.

6. The FAA reserves the right to amend or withdraw this offer at any time prior to its acceptance by the sponsor.

7. This offer shall expire and the United States shall not be obligated to pay any part of the costs of the project unless this offer has been accepted by the sponsor on or before September 30, 1981 or such subsequent date as may be prescribed in writing by the FAA.

8. The Federal Government does not now plan or contemplate the construction of any structures pursuant to paragraph 27 of Part V, Assurances, of the application dated September 11, 1981 and therefore it is understood and agreed that the

sponsor is under no obligation to furnish any new areas or new rights without cost to the Federal Government under this grant agreement. However, it is agreed and understood that the rights of the United States to cost free areas obtained under unexpired grant agreements with the sponsor are extended for twenty years from the date of this grant agreement. Furthermore, the responsibility for paying the cost of relocating any facilities located in such cost free areas shall be made in accordance with Advisory Circular 150/5300-7B, FAA Policy of Facility Relocations Occasioned by Airport Improvements or Changes.

9. The sponsor will submit for FAA approval a Minority Business Enterprise Program as required by 49 CFR Part 23 section 23.41 (a) no later than 90 days after the date of this agreement rather than prior to the grant as specified in 23.41 (b). All other requirements in Part 23 become effective as applicable upon execution of this grant.

10. It is understood and agreed that the sponsor will not advertise for bids or start construction work until approval of the final plans and specifications by the FAA. A deadline date of December 31, 1981 is hereby established for the submission of final plans and specifications by the sponsor.

11. It is mutually agreed that payments due from the United States under the terms of this grant agreement will be limited to not more than fifty percent (50%) of the maximum obligation cited on page 2 of this document until the sponsor has cleared and protected the approach zones, transitional zones

and primary surface of Runway 26L in accordance with the provisions of paragraph 23, page 8, sponsors assurances of the application for federal assistance dated September 11, 1981, which has been made a part of this grant agreement. For the purpose of this special condition the approach zones begin 200′ from the runway ends with a width of 1000 and extend outward and upward at a slope of 20:1 for Runways 26L expanding to a width of 1100 at a distance of 1000′. The primary surface is a surface longitudinally centered on the runway and extending 200′ beyond each end of the runway and is 1000′ in width. The transitional surfaces extend outward and upward at right angles to the runway centerline at a slope of 7:1 from the edges of the primary and approach surfaces until they intersect the horizontal or conical surface.

12. It is understood and agreed that if, during the life of the project, FAA determines that the grant amount exceeds the expected needs of the sponsor by $5,000 or five percent (5%) of the grant amount, whichever is greater, the grant amount can be reduced by letter from FAA to the sponsor advising of the budget change. Upon issuance of the letter, the maximum obligation of the United States under the grant is reduced to the specified amount.

The Sponsor's acceptance of this Offer and ratification and adoption of the Application for Federal Assistance incorporated herein shall be evidenced by execution of this instrument by the Sponsor, as hereinafter provided, and said Offer and Acceptance shall comprise a Grant Agreement, as provided by the Airport and Airway Development Act of 1970, as amended, constituting the

obligations and rights of the United States and the Sponsor with respect to the accomplishment of the Project and the operation and maintenance of the Airport. Such Grant Agreement shall become effective upon the Sponsor's acceptance of this Offer and shall remain in full force and effect throughout the useful life of the facilities developed under the Project but in any event not to exceed twenty years from the date of said acceptance.

UNITED STATES OF AMERICA
FEDERAL AVIATION ADMINISTRATION

By s/s Robert E. Harris,
(Title)

Acting Chief, Airports District Office

PART II - ACCEPTANCE

The County of Fulton does hereby ratify and adopt all statements, representations, warranties, covenants, and agreements contained in the Application for Federal Assistance and incorporated materials referred to in the foregoing Offer and does hereby accept said Offer and by such acceptance agrees to all of the terms and conditions thereof.

Executed this 29 day of September, 1981.

County of Fulton

By s/s Michael L. Lomax

(SEAL)

Title Chairman, Board of Commissioners

Attest: /s/ _____

Title: Clerk to Commission

CERTIFICATE OF SPONSOR'S ATTORNEY

I, Robert G. Young, acting as Attorney for the County of Fulton, (herein referred to as the "Sponsor") do hereby certify:

That I have examined the foregoing Grant Agreement and the proceedings taken by said Sponsor relating thereto, and find that the Acceptance thereof by said Sponsor has been duly authorized and that the execution thereof is in all respects due and proper and in accordance with the laws of the State of Georgia and the Regulations and further that, in my opinion, said Grant Agreement constitutes a legal and binding obligation of the Sponsor in accordance with the terms thereof.

Dated at Atlanta, Ga. this 29th day of September, 1981.

By s/s Robert G. Young

Title, County Attorney

FEDERAL ASSISTANCE

1. TYPE OF ACTION (Mark appropriate box)	☐ PREAPPLICATION ☐ APPLICATION ☐ NOTIFICATION OF INTENT (Bpt) ☐ REPORT OF FEDERAL ACTION	2. APPLICANT'S APPLICATION	a. NUMBER b. DATE Year 1981 month 9 day 17	3. STATE APPLICATION IDENTIFIER	a. NUMBER b. DATE ASSIGNED Year month day 19
Leave Blank					

4. LEGAL APPLICANT/RECIPIENT

a. Applicant Name	:	County of Fulton
b. Organizational Unit	:	Aviation Department
c. Street/P.O. Box	:	700 Fulton Ind. Blvd., N.W.
d. City	:	Atlanta e. County : Fulton
f. State	:	Georgia g. ZIP Code : 30336
h. Contact person (Name & telephone No.)	:	W.E. Phillips (404) 669-3618

5. FEDERAL EMPLOYER IDENTIFICATION NO.
58-6580-479-001

6. PROGRAM (From Federal Catalog)
a. NUMBER
b. TITLE
Repairing base and pavement Runway 8R-26L and taxiway

7. TITLE AND DESCRIPTION OF APPLICANT'S PROJECT
Do necessary repairs where base has failed, four-inch overlay of asphaltic concrete on Runway 8R-26L and parallel taxiway. Grooving of runway and repainting to conform to F.A.A. requirements.

8. TYPE OF APPLICANT/RECIPIENT
A - State; B - Interstate; C - Substate District; D - County; E - City; F - School District; G - Special Purpose District; H - Community Action Agency; I - Higher Educational Institution; J - Indian Tribe; K - Other (Specify)
Enter appropriate letter [G]

9. TYPE OF ASSISTANCE
A - Basic Grant; B - Supplemental Grant; C - Loan; D - Insurance; E - Other
Enter appropriate letter(s) [A]

10. AREA OF PROJECT IMPACT (Names of cities, counties, States, etc.)
N/A

11. ESTIMATED NUMBER OF PERSONS BENEFITING
N/A

12. TYPE OF APPLICATION
A - New; B - Continuation; C - Revision; D - Augmentation; E - Augmentation
Enter appropriate letter [A]

13. PROPOSED FUNDING

a. FEDERAL	$1,197,914.00
b. APPLICANT	59,950.00
c. STATE	59,950.00
d. LOCAL	00
e. OTHER	00
f. TOTAL	$1,316,714.00

14. CONGRESSIONAL DISTRICTS OF:
a. APPLICANT Ga. 5th
b. PROJECT Ga. 5th

15. PROJECT START DATE Year 1981 month 11 day 1

16. ESTIMATED DATE TO BE SUBMITTED TO FEDERAL AGENCY Year 1980 month 5 day 12

17. PROJECT DURATION
2 Months

18. TYPE OF CHANGE (For 12C or 12E)
A - Increase Dollars; B - Decrease Dollars; C - Increase Duration; D - Decrease Duration; E - Cancellation; F - Other (Specify)
Enter appropriate letter(s)

19. EXISTING FEDERAL IDENTIFICATION NUMBER
N/A

20. FEDERAL AGENCY TO RECEIVE REQUEST (Name, City, State, ZIP code)
Federal Aviation Agency, College Park, Ga. 30337

21. REMARKS ADDED
☒ Yes ☐ No

22. THE APPLICANT CERTIFIES THAT

a. To the best of my knowledge and belief, data in this pre-application/application are true and correct, the document has been duly authorized by the governing body of the applicant and the applicant will comply with the attached assurances if this assistance is approved.

b. If required by OMB Circular A-95 this application was submitted pursuant to instructions therein, to appropriate clearinghouses and all responses are attached.

	No response	Response attached
(1)	☐	☐
(2)	☐	☐
(3)	☐	☐

23. CERTIFYING REPRESENTATIVE
a. TYPED NAME AND TITLE
W.E. Phillips
Director of Aviation
b. SIGNATURE
s/s W.E. Phillips
c. DATE SIGNED Year 1981 month 9 day 11

24. AGENCY NAME
Department of Transportation

25. APPLICATION RECEIVED Year 1981 month 9 day 11

26. ORGANIZATIONAL UNIT
Federal Aviation Administration

27. ADMINISTRATIVE OFFICE
ATL-ADO

28. FEDERAL APPLICATION IDENTIFICATION

29. ADDRESS
1568 Willingham Dr., Suite C, College Park, GA 30337

30. FEDERAL GRANT IDENTIFICATION 3-13-0007-06

31. ACTION TAKEN
☒ a. AWARDED
☐ b. REJECTED
☐ c. RETURNED FOR AMENDMENT
☐ d. DEFERRED
☐ e. WITHDRAWN

32. FUNDING

a. FEDERAL	$1,197,914.00
b. APPLICANT	123,902.00
c. STATE	00
d. LOCAL	00
e. OTHER	00
f. TOTAL	$1,330,816.00

33. ACTION DATE Year 1981 month 10 day 2

34. STARTING DATE Year 1981 month 9 day 20

35. CONTACT FOR ADDITIONAL INFORMATION (Name and telephone number)
George C. Altman
(404) 763-7631

36. ENDING DATE Year 19 month day

37. REMARKS ADDED
☐ Yes ☒ No

38. FEDERAL AGENCY A-95 ACTION
a. In taking above action, any comments received from clearinghouse were considered. If agency response is due under provisions of part 1, OMB Circular A-95, it has been or is being made.

39. FEDERAL AGENCY A-95 OFFICIAL (Name and telephone no.)

PART II

PROJECT APPROVAL INFORMATION
SECTION A

Item 1.
Does this assistance request require State, local, regional, or other priority rating?
____ Yes __X__ No
Name of Governing Body ____
Priority Rating ____

Item 2.
Does this assistance request require State, local, advisory, educational or health clearances?
____ Yes __X__ No
Name of Agency Board ____
(Attach Documentation)

Item 3.
Does this assistance request require clearinghouse review in accordance with OMB Circular A-95?
____ Yes __X__ No
(Attach Comments)

Item 4.
Does this assistance request require State, local, regional or other planning approval?
____ Yes __X__ No
Name of Agency approving
Date ____

Item 5.
Is the proposed project covered by an approved comprehensive plan?
__X__ Yes ____ No
Check one. State ☐ Local ☐ Regional ☒
Location of plan: Atlanta Regional Commission

Item 6.
Will the assistance requested serve a Federal installation? __X__ Yes ____ No
Name of Federal Installation: U.S. Army & F.A.A.
Federal Population benefiting from Project: 200

Item 7.
Will the assistance requested be on Federal land or installation?
____ Yes __X__ No
Name of Federal Installation ____
Location of Federal Land ____
Percent of Project ____

Item 8.
Will the assistance requested have an impact or effect on the environment?
____ Yes __X__ No
See instructions for additional information to be provided

Item 9.
Will the assistance requested cause the displacement of individuals families, businesses, or farms?
____ Yes __X__ No
Number of
Individuals ____
Families ____
Businesses ____
Farms ____

Item 10.
Is there other related Federal assistance on this project previous, pending, or anticipated?
____ Yes __X__ No
See instructions for additional information to be provided

PART II - SECTION C

The Sponsor hereby represents and certifies as follows:

1. Compatible Land Use. — The Sponsor has taken the following actions to assure compatible usage of land adjacent to or in the vicinity of the airport:

I. *Fulton County Zoning Resolution.* (1) Regulates uses and heights in all airport surface zones to assure compatibility with the Airport operation.

II. *Fulton County Comprehensive Land Use Plan.* (1) A study continually updated by the Fulton County Planning Department.

III. *ARC Regional Land Use Plan.* (1) Serves as a guide to future land use in areas adjacent to the Airport in all political jurisdictions.

2. Defaults. — The Sponsor is not in default on any obligation to the United States or any agency of the United States Government relative to the development, operation, or maintenance of any airport, except as stated herewith:

3. Possible Disabilities. — There are no facts or circumstances (including the existence of effective or proposed leases, use agreements or other legal instruments affecting use of the Airport or the existence of pending litigation or other legal proceedings) which in reasonable probability might make it impossible for the Sponsor to carry out and complete the Project or carry out the provisions of Part V of this Application, either by limiting its legal or financial ability or otherwise, except as follows:

4. Land. — (a) The Sponsor holds the following property interest in the following areas of land* which are to be developed or used as part of or in connection with the Airport, subject to the following exceptions, encumbrances, and adverse interests, all of which areas are identified on the aforementioned property map designated as Exhibit "A":

Fee Simple Title to Areas shaded on Exhibit "A" on Project #5-13-0007-04

The Sponsor further certifies that the above is based on a title examination by a qualified attorney or title company and that such attorney or title company has determined that the Sponsor holds the above property interests.

(b) The Sponsor will acquire within a reasonable time, but in any event prior to the start of any construction work under the Project, the following property interest in the following areas of land* on which such construction work is to be performed, all of which areas are identified on the aforementioned property map designated as Exhibit "A":

NA

(c) The Sponsor will acquire within a reasonable time, and if feasible prior to the completion of all construction work under the Project, the following property interest in the following areas of land* which are

---

* State character of property interest in each area and list and identify for each all exceptions, encumbrances, and adverse interests of every kind and nature, including liens, easements, leases, etc. The separate area land need only be identified here by the area numbers shown on the property map.

to be developed or used as part of or in connection with the Airport as it will be upon completion of the Project, all of which areas are identified on the aforementioned property map designated as Exhibit "A":

5. Exclusive Rights. — There is no grant of an exclusive right for the conduct of any aeronautical activity at any airport owned or controlled by the Sponsor except as follows:

PART III - BUDGET INFORMATION - CONSTRUCTION

SECTION A - GENERAL

1. Federal Domestic Assistance Catalog No: 20 • 102
2. Functional or Other Breakout:

SECTION B - CALCULATION OF FEDERAL GRANT

	Cost Classification	Use only for revisions		Total Amount Required
		Latest Approved Amount	Adjustment + or (-)	
1	Administration expense	$	$	$
2	Preliminary expense			
3	Land, structures, right-of-way			
4	Architectural engineering basic fees			
5	Other architectural engineering fees			
6	Project inspection fees			
7	Land development			
8	Relocation Expenses			
9	Relocation payments to Individuals and Businesses			
10	Demolition and removal			
11	Construction and project improvement			1,316,714
12	Equipment			
13	Miscellaneous			
14	Total (Lines 1 through 13)			1,316,714
15	Estimated Income (if applicable)			
16	Net Project Amount (Line 14 minus 15)			1,316,714
17	Less: Ineligible Exclusions			
18	Add: Contingencies			
19	Total Project Amt. (Excluding Rehabilitation Grants)			1,316,714
20	Federal Share requested of Line 19			1,197,014
21	Add Rehabilitation Grants Requested (100 Percent)			
22	Total Federal grant requested (Lines 20 & 21)			1,197,014
23	Grantee share			59,850
24	Other shares			59,850
25	Total project (Lines 22, 23 & 24)	$	$	$ 1,316,714

SECTION C - EXCLUSIONS		
Classification	Ineligible for Participation (1)	Excluded from Contingency Provision (2)
26.	$	$
a.		
b.		
c.		
d.		
e.		
f.		
g. Totals	$	$

SECTION D - PROPOSED METHOD OF FINANCING NON-FEDERAL SHARE	
27. Grantee Share	$ 59,850
a. Securities	
b. Mortgages	
c. Appropriations (By Applicant)	
d. Bonds	
e. Tax Levies	
f. Non Cash	
g. Other (Explain)	
h. TOTAL - Grantee share	59,850
28. Other Shares	
a. State	59,850
b. Other	
c. Total Other Shares	59,850
29. TOTAL	$ 119,700

SECTION E - REMARKS

PART IV PROGRAM NARRATIVE (Attach - See Instructions)

PART IV - PROGRAM NARRATIVE STATEMENT

NEED: The pavement that is to be overlaid has been in place for over eleven (11) years and has deteriorated in some areas almost to the point of total failure. If this airport is to continue to adequately serve the General Aviation traffic of approximately 250,000 operations per year the areas covered in this application must be repaved.

OBJECTIVE: To repair the areas where base failure has occurred, and repave Runway 8R-26L; the taxiway parallel to the above runway and the stub taxiways; also, a portion of Runway 14-32 in order to insure a smooth transition with the new grade of Runway 8R-26L.

METHOD OF ACCOMPLISHMENT:

Remove those areas of base that shows signs of failure and rebuild; fill cracks in existing paving with a leveling course; repave with a four (4) inch course of asphaltic concrete. After the new pavement is in place the surface of 8R-26L shall be grooved to facilitate the runoff of surface water; the final operation under this application shall be the painting of runways and taxiways.

LOCATION OF PROJECT:

Fulton County Airport — Brown Field is located at Lat: 33° -46'-47"; Long: 84° -31'-20" in Fulton County, State of Georgia.

BENEFITS: The benefits that would accrue from this project would be to preserve the landing

areas that are vitally needed in the Atlanta area for general aviation aircraft and would also allow this airport to better fulfill its role as a reliever airport in the NASP. It will also increase the range of aircraft that might utilize this field by increasing the strength of the pavement. Finally it will improve the safety of the operating aircraft by removing and replacing those areas that are in danger of total failure in the existing pavement.

EXHIBIT "B"

SPONSOR ASSURANCE TO ACCOMPANY PROJECT APPLICATION DATED 5/12/80, FOR A GRANT OF FUNDS FOR THE DEVELOPMENT OR IMPROVEMENT OF THE FULTON COUNTY AIRPORT — BROWN FIELD AIRPORT

The County of Fulton (hereinafter referred to as the "sponsor") HEREBY AGREES THAT as a condition to receiving any Federal financial assistance from the Department of Transportation it will comply with Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. 2000d, 42 U.S.C. 2000d-4 (hereinafter referred to as the "Act"), and all requirements imposed by or pursuant to Title 49, Code of Federal Regulations, Department of Transportation, Subtitle A, Office of the Secretary; Part 21, Nondiscrimination in Federally Assisted Programs of the Department of Transportation — Effectuation of Title VI of the Civil Rights Act of 1964 (hereinafter referred to as the "Regulations"), to the end that in accordance with the Act and Regulations no person in the United States shall, on the grounds of race, color, or national origin, be

excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity for which the sponsor receives Federal financial assistance from the Department of Transportation including the Federal Aviation Administration, and HEREBY GIVES ASSURANCE THAT it will promptly take any measures necessary to effectuate this agreement. This assurance is required by subsection 21.7(a)(1) of the Regulations. Part 21 is incorporated herein and made a part hereof by reference.

More specifically and without limiting the above general assurance, the sponsor hereby gives the following specific assurances with respect to ADAP Project No. _____.

1. That the sponsor agrees that each "program" and each "facility" as defined in subsections 21.23(e) and 21.23(b) of the Regulations, will be (with regard to a "program") conducted, or will be (with regard to a "facility") operated in compliance with all requirements imposed by or pursuant to the Regulations.

2. That the sponsor shall insert the following notification in all solicitations for bids for work or material subject to the Regulations and made in connection with ADAP Project No. _____ and in adapted form in all proposals for negotiated agreements:

> The (Name of sponsor), in accordance with Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. 2000d to 2000d-4 and Title 49, Code of Federal Regulations, Department of Trans-

portation, Subtitle A, Office of the Secretary, Part 21, Nondiscrimination in Federally assisted programs of the Department of Transportation issued pursuant to such Act, hereby notifies all bidders that it will affirmatively insure that in any contract entered into pursuant to this advertisement, minority business enterprises will be afforded full opportunity to submit bids in response to this invitation and will not be discriminated against on the grounds of race, color, or national origin in consideration for an award.

3. That the sponsor shall insert the clauses of Attachment 1 of this assurance in every contract subject to the Act and the Regulations.

4. That where the sponsor receives Federal financial assistance to construct a facility, or part of a facility, the assurance shall extend to the entire facility and facilities operated in connection therewith.

5. That where the sponsor receives Federal financial assistance in the form, or for the acquisition of real property or an interest in real property, the assurance shall extend to rights to space on, over, or under such property.

6. That the sponsor shall include the appropriate clauses set forth in Attachment 2 of this assurance, as a covenant running with the land, in any future deeds, leases, permits, licenses, and similar agreements entered into by the sponsor with other parties: (a) for the

subsequent transfer of real property acquired or improved under the Airport Development Aid Program of the Federal Aviation Administration, and (b) for the construction or use of or access to space on, over, or under real property acquired, or improved under the said Airport Development Aid Program.

7. That this assurance obligates the sponsor for the period during which Federal financial assistance is extended to the program, except where the Federal financial assistance is to provide, or is in the form of, personal property, or real property or interest therein or structures or improvements thereon, in which case the assurance obligates the sponsor or any transferee for the longer of the following periods: (a) the period during which the property is used for a purpose for which the Federal financial assistance is extended, or for another purpose involving the provision of similar services or benefits, or (b) the period during which the sponsor retains ownership or possession of the property.

8. The sponsor shall provide for such methods of administration for the program as are found by the Secretary of Transportation or the official to whom he delegates specific authority to give reasonable guarantee that it, other sponsors, subgrantees, contractors, subcontractors, transferees, successors in interest, and other participants of Federal financial assistance under such program will comply with all requirements imposed or pursuant to the Act, the Regulations, and this assurance.

9. The sponsor agrees that the United States has a right to seek judicial enforcement with regard to any

matter arising under the Act, the Regulations, and this assurance.

THIS ASSURANCE is given in consideration of and for the purpose of obtaining any and all Federal grants, loans, contracts, property, discounts, or other Federal financial assistance extended after the date hereof to the sponsor by the Department of Transportation under the Airport Development Aid Program of the Federal Aviation Administration and is binding on it, contractors, subcontractors, transferees, successors in interest and other participants in the ADAP Project No. _____. The person or persons whose signatures appear below are authorized to sign this assurance on behalf of the sponsor.

DATED 9/14/81

FULTON COUNTY,
(Sponsor)

by W.E. Phillips
(Signature of Authorized Sponsor)

DATED _____

_____
(Sponsor)

by _____
(Signature of Authorized Official)

Attachments 1 and 2

ATTACHMENT 1

During the performance of this contract, the contractor, for itself, its assignees and successors in interest (hereinafter referred to as the "contractor") agrees as follows:

1. *Compliance with Regulations.* The contractor shall comply with the Regulations relative to non-discrimination in Federally-assisted programs of the Department of Transportation (hereinafter, "DOT") Title 49, Code of Federal Regulations, Part 21, as they may be amended from time to time, (hereinafter referred to as the Regulations), which are herein incorporated by reference and made a part of this contract.

2. *Nondiscrimination.* The contractor, with regard to the work performed by it during the contract, shall not discriminate on the grounds of race, color, or national origin in the selection and retention of subcontractors, including procurements of materials and leases of equipment. The contractor shall not participate either directly or indirectly in the discrimination prohibited by Section 21.5 of the Regulations, including employment practices when the contract covers a program set forth in Appendix B of the Regulations.

3. *Solicitations for Subcontracts, Including Procurements of Materials and Equipment.* In all solicitations either by competitive bidding or negotiation made by the contractor for work to be performed under a subcontract, including procurements of materials or leases of equipment, each potential subcontractor or supplier shall be notified by the contractor of the contractor's obligations under this contract and the

Regulations relative to nondiscrimination on the grounds of race, color, or national origin.

4. *Information and Reports.* The contractor shall provide all information and reports required by the Regulations or directives issued pursuant thereto, and shall permit access to its books, records, accounts, other sources of information, and its facilities as may be determined by the sponsor or the Federal Aviation Administration to be pertinent to ascertain compliance with such Regulations, orders, and instructions. Where any information required of a contractor is in the exclusive possession of another who fails or refuses to furnish this information the contractor shall so certify to the sponsor or the Federal Aviation Administration as appropriate, and shall set forth what efforts it has made to obtain the information.

5. *Sanctions for Noncompliance.* In the event of the contractor's noncompliance with the nondiscrimination provisions of this contract, the sponsor shall impose such contract sanctions as it or the Federal Aviation Administration may determine to be appropriate, including, but not limited to —

a. withholding of payments to the contractor under the contract until the contractor complies, and/or

b. cancellation, termination, or suspension of the contract, in whole or in part.

6. *Incorporation of Provisions.* The contractor shall include the provisions of paragraphs 1 through 5 in every subcontract, including procurements of materials and leases of equipment, unless exempt by the Regulations or directives issued pursuant thereto. The contractor shall

take such action with respect to any subcontract or procurement as the sponsor or the Federal Aviation Administration may direct as a means of enforcing such provisions including sanctions for noncompliance: Provided, however, that, in the event a contractor becomes involved in, or is threatened with, litigation with a subcontractor or supplier as a result of such direction, the contractor may request the sponsor to enter into such litigation to protect the interests of the sponsor and, in addition, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

ATTACHMENT 2

The following clauses shall be included in all deeds, licenses, leases, permits, or similar instruments entered into by the (Name of sponsor) pursuant to the provisions of Assurance 6(a).

The (grantee, licensee, lessee, permitee, etc., as appropriate) for himself, his heirs, personal representatives, successors in interest, and assigns, as a part of the consideration hereof, does hereby covenant and agree (in the case of deeds and leases add "as a covenant running with the land") that in the event facilities are constructed, maintained, or otherwise operated on the said property described in this (deed, license, lease, permit, etc.) for a purpose for which a Department of Transportation program or activity is extended or for another purpose involving the provision of similar services or benefits, the (grantee, licensee, lessee, permitee, etc.) shall maintain and operate such facilities and services in compliance with all other requirements imposed pursuant to Title 49, Code of

Federal Regulations, Department of Transportation, Subtitle A, Office of the Secretary, Part 21, Non-discrimination in Federally-assisted programs of the Department of Transportation — Effectuation of Title VI of the Civil Rights Act of 1964, and as said Regulations may be amended.

(Include in licenses, leases, permits, etc.)*

That in the event of breach of any of the above nondiscrimination covenants, (Name of sponsor) shall have the right to terminate the (license, lease, permit, etc.) and to re-enter and repossess said land and the facilities thereon, and hold the same as if said (license, lease, permit, etc.) had never been made or issued. This provision shall not be effective until the procedures of Title 49, Code of Federal Regulations, Part 21 are followed and completed including exercise or expiration of appeal rights.

(Include in deeds.)*

That in the event of breach of any of the above nondiscrimination covenants, (Name of sponsor) shall have the right to re-enter said lands and facilities thereon, and the above described lands and facilities shall thereupon revert to and vest in and become the absolute property of (Name of sponsor) and its assigns. This provision shall not be effective until the procedures of Title 49, Code of Federal Regulations, Part 21 are followed and completed including exercise or expiration of appeal rights.

The following shall be included in all deeds, licenses, leases, permits, or similar agreements entered into by

(Name of sponsor) pursuant to the provisions of Assurance 6(b).

The (grantee, licensee, lessee, permitee, etc., as appropriate) for himself, his personal representatives, successors in interest, and assigns, as a part of the consideration hereof, does hereby covenant and agree (in the case of deeds and leases add "as a covenant running with the land") that (1) no person on the grounds of race, color, or national origin shall be excluded from participation in, denied the benefits of, or be otherwise subjected to discrimination in the use of said facilities, (2) that in the construction of any improvements on, over, or under such land and the furnishing of services thereon, no person on the grounds of race, color, or national origin shall be excluded from participation in, denied the benefits of, or otherwise be subjected to discrimination, (3) that the (grantee, licensee, lessee, permitee, etc.) shall use the premises in compliance with all other requirements imposed by or pursuant to Title 49, Code of Federal Regulations, Department of Transportation, Subtitle A, Office of the Secretary, Part 21, Nondiscrimination in Federally-assisted programs of the Department of Transportation-Effectuation of Title VI of the Civil Rights Act of 1964, and as said Regulations may be amended.

(Include in licenses, leases, permits, etc.)*

That in the event of breach of any of the above nondiscrimination covenants, (Name of sponsor) shall have the right to terminate the (license, lease, permit, etc.) and to re-enter and repossess said land and the facilities thereon, and hold the same as if said (license, lease, permit, etc.) had never been made or issued. This

provision shall not be effective until the procedures of Title 49, Code of Federal Regulations, Part 21 are followed and completed including exercise or expiration of appeal rights.

(Include in deeds.)*

That in the event of breach of any of the above nondiscrimination covenants, (Name of sponsor) shall have the right to re-enter said land and facilities thereon, and the above described lands and facilities shall thereupon revert to and vest in and become the absolute property of (Name of sponsor) and its assigns. This provision shall not be effective until the procedures of Title 49, Code of Federal Regulations, Part 21 are followed and completed including exercise or expiration of appeal rights.

* Reverter clause and related language to be used only when it is determined that such a clause is necessary in order to effectuate the purpose of Title VI of the Civil Rights Act of 1964.

PART V - ASSURANCES

The applicant hereby assures and certifies that it will comply with the regulations, policies, guidelines, and requirements including Office of Management and Budget Circulars No. A-95 (41 FR 2052), A-102 (42 FR 45828), and FMC 74-4 (39 FR 27133; as amended by 43 FR 50977), as they relate to the application, acceptance, and use of Federal funds for this Federally assisted project. Also, the applicant gives the assurance and certifies with respect to the grant that:

1. *Authority of applicant.* It possesses legal authority to apply for the grant, and to finance and construct the proposed facilities; that a resolution, motion, or

similar action has been duly adopted or passed as an official act of the applicant's governing body, authorizing the filing of the application, including all understandings and assurances contained therein, and directing and authorizing the person identified as the official representative of the applicant to act in connection with the application and to provide such additional information as may be required.

2. *E.O. 11926 and E.O. 11288.* It will comply with the provisions of: Executive Order 11296, relating to evaluation of flood hazards, and Executive Order 11288, relating to the prevention, control, and abatement of water pollution.

3. *Sufficiency of funds.* It will have sufficient funds available to meet the non-Federal share of the cost for construction projects. Sufficient funds will be available when construction is completed to assure effective operation and maintenance of the facility for the purposes constructed.

4. *Construction.* It will obtain approval by the appropriate Federal agency of the final working drawings and specifications before the project is advertised or placed on the market for bidding; that it will construct the project, or cause it to be constructed, to final completion in accordance with the application and approved plans and specifications; that it will submit to the appropriate Federal agency for prior approval changes that alter the costs of the project, use of space, or functional layout; that it will not enter into a construction contract(s) for the project or undertake other

activities until the conditions of the construction grant program(s) have been met.

5. *Supervision, inspection, and reporting.* It will provide and maintain competent and adequate architectural engineering supervision and inspection at the construction site to insure that the completed work conforms with the approved plans and specifications; that it will furnish progress reports and such other information as the Federal grantor agency may require.

6. *Operation of facility.* It will operate and maintain the facility in accordance with the minimum standards as may be required or prescribed by the applicable Federal, State, and local agencies for the maintenance and operation of such facilities.

7. *Access to records.* It will give the grantor agency and the Comptroller General, through any authorized representative, access to and the right to examine all records, books, papers, or documents related to the grant.

8. *Access for handicapped.* It will conduct its programs and operate its facilities in accordance with the requirements of Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and will assure that no qualified handicapped person shall, solely by reason of his or her handicap be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination, including discrimination in employment, under any grant program or activity that receives funds or benefits from this grant. The sponsor further assures that its programs

will be conducted and its facilities operated, in compliance with the requirements imposed by or pursuant to 49 CFR Part 27.

9. *Commencement and completion.* It will cause work on the project to be commenced within a reasonable time after receipt of notification from the approving Federal agency that funds have been approved and that the project will be prosecuted to completion with reasonable diligence.

10. *Disposition of interest.* It will not dispose of or encumber its title or other interests in the site and facilities during the period of Federal interest or while the Government holds bonds, whichever is the longer.

11. *Civil Rights.* It will comply with Title VI of the Civil Rights Act of 1964 (P.L. 88-352) and in accordance with Title VI of that Act, no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity for which the applicant receives Federal financial assistance and will immediately take any measures necessary to effectuate this agreement. If any real property or structure thereon is provided or improved with the aid of Federal financial assistance extended to the Applicant, this assurance shall obligate the Applicant, or in the case of any transfer of such property, any transferee, for the period during which the real property or structure is used for a purpose for which the Federal financial assistance is extended or for another purpose

involving the provision of similar services or benefits.

12. *Private gain.* It will establish safeguards to prohibit employees from using their positions for a purpose that is or gives the appearance of being motivated by a desire for private gain for themselves or others, particularly those with whom they have family, business, or other ties.

13. *Relocation assistance.* It will comply with the requirements of Title II and Title III of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91-646) which provides for fair and equitable treatment of persons displaced as a result of Federal and Federally assisted programs.

14. *OMB Circular A-102.* It will comply with all requirements imposed by the Federal grantor agency concerning special requirements of law, program requirements, and other administrative requirements approved in accordance with Office of Management and Budget Circular No. A-102.

15. *Hatch Act.* It will comply with the provisions of the Hatch Act which limit the political activity of employees.

16. *Federal Fair Labor Standards Act.* It will comply with the minimum wage and maximum hours provisions of the Federal Fair Labor Standards Act, as they apply to hospital and educational institution employees of State and local governments.

17. *Effective date and duration.* These covenants shall become effective upon acceptance by the Sponsor of

an offer of Federal aid for the Project or any portion thereof, made by the FAA and shall constitute a part of the Grant Agreement thus formed. These covenants shall remain in full force and effect throughout the useful life of the facilities developed under this Project, but in any event not to exceed twenty (20) years from the date of said acceptance of an offer of Federal aid for the Project. However, these limitations on the duration of the covenants do not apply to the covenant against exclusive rights and real property acquired with Federal funds. Any breach of these covenants on the part of the sponsor may result in the suspension or termination of, or refusal to grant Federal assistance under, FAA administered programs, or such other action which may be necessary to enforce the rights of the United States under this agreement.

18. *Conditions and limitations on airport use.* It will operate the Airport as such for the use and benefit of the public. In furtherance of this covenant (but without limiting its general applicability and effect), the Sponsor specifically agrees that it will keep the Airport open to all types, kinds, and classes of aeronautical use on fair and reasonable terms without discrimination between such types, kinds, and classes. Provided, that the Sponsor may establish such fair, equal, and not unjustly discriminatory conditions to be met by all users of the airport as may be necessary for the safe and efficient operation of the Airport; And Provided Further, That the Sponsor may prohibit or limit any given type, kind, or class of aeronautical use of the Airport if such action is

necessary for the safe operation of the Airport or necessary to serve the civil aviation needs of the public.

19. *Exclusive right.* It

a. Will not grant or permit any exclusive right forbidden by Section 308(a) of the Federal Aviation Airport Act of 1958 (49 U.S.C. Section 1349(a)) at the Airport, or at any other airport now owned or controlled by it;

b. Agrees that, in furtherance of the policy of the FAA under this covenant, unless authorized by the Administrator, it will not, either directly or indirectly, grant or permit any person, firm or corporation the exclusive right at the Airport, or at any other airport now owned or controlled by it, to conduct any aeronautical activities, including, but not limited to charter flights, pilot training, aircraft rental and sightseeing, aerial photography, crop dusting, aerial advertising and surveying, air carrier operations, aircraft sales and services, sale of aviation petroleum products whether or not conducted in conjunction with other aeronautical activity, repair and maintenance of aircraft, sale of aircraft parts, and any other activities which because of their direct relationship to the operation of aircraft can be regarded as an aeronautical activity.

c. Agrees that it will terminate any existing exclusive right to engage in the sale of gasoline or oil, or both, granted before July 17, 1962, at

such an airport, at the earliest renewal, cancellation, or expiration date applicable to the agreement that established the exclusive right; and

d. Agrees that it will terminate any other exclusive right to conduct an aeronautical activity now existing at such an airport before the grant of any assistance under the Airport and Airway Development Act.

20. *Public use and benefit.* It agrees that it will operate the Airport for the use and benefit of the public, on fair and reasonable terms, and without unjust discrimination. In furtherance of the covenant (but without limiting its general applicability and effect), the Sponsor specifically covenants and agrees;

a. That in its operation and the operation of all facilities on the Airport, neither it nor any person or organization occupying space or facilities thereon will discriminate against any person or class of persons by reason of race, color, creed, or national origin in the use of any of the facilities provided for the public on the Airport.

b. That in any agreement, contract, lease or other arrangement under which a right or privilege at the Airport is granted to any person, firm, or corporation to conduct or engage in any aeronautical activity for furnishing services to the public at the Airport, the Sponsor will insert and enforce provisions requiring the contractor—

(1) to furnish said services on a fair, equal, and not unjustly discriminatory basis to all users thereof, and

(2) to charge fair, reasonable, and not unjustly discriminatory prices for each unit or service; provided, that the contractor may be allowed to make reasonable and nondiscriminatory discounts, rebates, or other similar types of price reductions to volume purchasers.

c. That it will not exercise or grant any right or privilege which operates to prevent any person, firm, or corporation operating aircraft on the airport from performing any services on its own aircraft with its own employees (including, but not limited to maintenance and repair) that it may choose to perform.

d. In the event the sponsor itself exercises any of the rights and privileges referred to in subsection b, the services involved will be provided on the same conditions as would apply to the furnishing of such services by contractors or concessionaires of the sponsor under the provisions of such subsection b.

21. *Nonaviation activities.* Nothing contained herein shall be construed to prohibit the granting or exercise of an exclusive right for the furnishing of nonaviation products and supplies or any service of a nonaeronautical nature or to obligate the sponsor to furnish any particular nonaeronautical service at the airport.

22. *Operation and maintenance of the airport.* It will operate and maintain in a safe and serviceable condition the airport and all facilities thereon and connected therewith which are necessary to serve the aeronautical users of the airport other than facilities owned or controlled by the United States, and will not permit any activity thereon which would interfere with its use for airport purposes; provided, that nothing contained herein shall be construed to require that the airport be operated for aeronautical uses during temporary periods when snow, flood, or other climatic conditions interfere with such operation and maintenance; repair, restoration, or replacement of any structure or facility which is substantially damaged or destroyed due to an act of God or other condition or circumstance beyond the control of the sponsor. In furtherance of this covenant, the sponsor will have in effect at all times arrangements for —

a. Operating the airport's aeronautical facilities whenever required;

b. Promptly marking and lighting hazards resulting from airport conditions, including temporary conditions; and

c. Promptly notifying airmen of any condition affecting aeronautical use of the airport.

23. *Airport hazards.* Insofar as it is within its power and reasonable, the sponsor will, either by the acquisition and retention of easements or other interests in or rights for the use of land or airspace or by the adoption and enforcement of zoning regulations,

prevent the construction, erection, alteration, or growth of any structure, tree, or other object in the approach areas of the runways of the airport, which would constitute an airport hazard. In addition, the sponsor will not erect or permit the erection of any permanent structure or facility which would interfere materially with the use, operation, or future development of the airport, in any portion of a runway approach area in which the sponsor has acquired, or hereafter acquires, property interests permitting it to so control the use made of the surface of the land.

24. *Use of adjacent land.* Insofar as it is within its power and reasonable, the Sponsor will, either by the acquisition and retention of easements or other interest in or rights for the use of land or airspace or by the adoption and enforcement of zoning regulations, take action to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations including landing and takeoff of aircraft.

25. *Airport layout plan.* It will keep up to date at all times an airport layout plan of the airport showing (1) boundaries of the airport and all proposed additions thereto, together with the boundaries of all offsite areas owned or controlled by the sponsor for airport purposes, and proposed additions thereto; (2) the location and nature of all existing and proposed airport facilities and structures (such as runways, taxiways, aprons, terminal buildings, hangars and roads), including all proposed extensions and

reductions of existing airport facilities; and (3) the location of all existing and proposed nonaviation areas and of all existing improvements thereon. Such airport layout plan and each amendment, revision, or modification thereof, shall be subject to the approval of the FAA, which approval shall be evidenced by the signature of a duly authorized representative of the FAA on the face of the airport layout plan. The sponsor will not make or permit any changes or alterations in the airport or in any of its facilities other than in conformity with the airport layout plan as so approved by the FAA, if such changes or alterations might adversely affect the safety, utility, or efficiency of the airport.

26. *Federal use of facilities.* All facilities of the airport developed with Federal aid and all those usable for the landing and taking off of aircraft, will be available to the United States at all times, without charge, for use by government aircraft in common with other aircraft, except that if the use by government aircraft is substantial, a reasonable share, proportional to such use, of the cost of operating and maintaining facilities so used, may be charged. Unless otherwise determined by the FAA, or otherwise agreed to by the sponsor and the using agency, substantial use of an airport by government aircraft will be considered to exist when operations of such aircraft are in excess of those which, in the opinion of the FAA, would unduly interfere with use of the landing area by other authorized aircraft, or during any calendar month that —

a. Five (5) or more government aircraft are regularly based at the airport or on land adjacent thereto; or

b. The total number of movements (counting each landing as a movement and each takeoff as a movement) of government aircraft is 300 or more, or the gross accumulative weight of government aircraft using the airport (the total movements of government aircraft multiplied by gross weights of such aircraft) is in excess of five million pounds.

27. *Areas for FAA use.* Whenever so requested by the FAA, the sponsor will furnish without cost to the Federal Government, for construction, operation, and maintenance of facilities for air traffic control activities, or weather reporting activities and communication activities related to air traffic control, such areas of land or water, or estate therein, or rights in buildings of the sponsor as the FAA may consider necessary or desirable for construction at Federal expense of space or facilities for such purposes. The approximate amounts of areas and the nature of the property interests and/or rights so required will be set forth in the grant agreement relating to the project. Such areas or any portion thereof will be made available as provided herein within four months after receipt of written requests from the FAA.

28. *Fee and rental structure.* The airport operator or owner will maintain a fee and rental structure for the facilities and services being provided the airport users which will make the airport as self-sustaining

as possible under the circumstances existing at the airport, taking into account such factors as the volume of traffic and economy of collection.

29. *Reports to FAA.* It will furnish the FAA with such annual or special airport financial and operational reports as may be reasonably requested. Such reports may be submitted on forms furnished by the FAA, or may be submitted in such manner as the sponsor elects so long as the essential data are furnished. The airport and all airport records and documents affecting the airport, including deeds, leases, operations and use agreements, regulations, and other instruments, will be made available for inspection and audit by the Secretary and the Comptroller General of the United States, or their duly authorized representatives, upon reasonable request. The sponsor will furnish to the FAA or to the General Accounting Office, upon request, a true copy of any such document.

30. *System of Accounting.* All project accounts and records will be kept in accordance with a standard system of accounting if so prescribed by the Secretary.

31. *Interfering right.* If, at any time, it is determined by the FAA that there is any outstanding right or claim of right in or to the airport property, other than those set forth in Part II of the Application for Federal Assistance, the existence of which creates an undue risk of interference with the operation of the airport or the performance of the covenants of this Part, the sponsor will acquire, extinguish, or modify such right or claim or right in a manner acceptable to the FAA.

32. *Performance obligation.* It will not enter into any transaction which would operate to deprive it of any of the rights and powers necessary to perform any or all of the covenants made herein, unless by such transaction the obligation to perform all such covenants is assumed by another public agency found by the FAA to be eligible under the Act and regulations to assume such obligations and having the power, authority, and financial resources to carry out all such obligations. If an arrangement is made for management or operation of the airport by any agency or person other than the sponsor or an employee of the sponsor, the sponsor will reserve sufficient rights and authority to insure that the airport will be operated and maintained in accordance with the Act, the regulations and these covenants.

33. *Meaning of terms.* Unless the context otherwise requires, all terms used in these covenants which are defined in the Act and the regulations shall have the meanings assigned to them therein.

34. *Audit.* It will provide for audit of this grant project to be made in accordance with Attachment P of Office of Management and Budget Circular A-102.

35. *Section 30.*

    a. It will undertake an affirmative action program, as required by 14 CFR Part 152, Subpart E, to ensure that no person shall, on the grounds of race, creed, color, national origin, or sex, be excluded from participating in any employment, contracting, or leasing activities covered in 14

CFR Part 152, Subpart E. The sponsor assures that no person shall be excluded, on these grounds, from participating in or receiving the services or benefits of any program or activity covered by this subpart. The sponsor assures that it will require that its covered organizations provide assurance to the sponsor that they similarly will undertake affirmative action programs and that they will require assurances from their suborganizations, as required by 14 CFR Part 152, Subpart E, to the same effect.

b. It agrees to comply with any affirmative action plan or steps for equal employment opportunity required by 14 CFR Part 152, Subpart E, as part of the affirmative action program or by any Federal, State, or local agency or court, including those resulting from a conciliation agreement, a consent decree, court order, or similar mechanism. The sponsor agrees that State or local affirmative action plan will be used in lieu of any affirmative action plan or steps required by 14 CFR Part 152, Subpart E, only when they fully meet the standards set forth in 14 CFR 152.409. The sponsor agrees to obtain a similar assurance from its covered organizations, and to cause them to require a similar assurance of their covered suborganizations, as required by 14 CFR Part 152, Subpart E.

36. *Minority Business Enterprise (MBE).*

a. It is the policy of the Department of Transportation that minority business enterprises as defined in 49 CFR Part 23 shall

have the maximum opportunity to participate in the performance of contracts financed in whole or in part with Federal funds under this agreement. Consequently, the MBE requirements of 49 CFR Part 23 apply to this agreement.

b. The sponsor or its contractor agrees to ensure that minority business enterprises, as defined in 49 CFR Part 23, have the maximum opportunity to participate in the performance of contracts and subcontracts financed in whole or in part with Federal funds provided under this agreement. In this regard, the sponsor or its contractors shall take all necessary and reasonable steps in accordance with 49 CFR Part 23 to ensure that minority business enterprises have the maximum opportunity to compete for and perform contracts. The sponsor and its contractors shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of DOT-assisted contracts.

c. If, as a condition of assistance, the sponsor has submitted and the Department has approved a minority business enterprise affirmative action program which the sponsor agrees to carry out, this program is incorporated in this financial assistance agreement by reference. This program shall be treated as a legal obligation and failure to carry out its terms shall be treated as a violation of this financial assistance agreement. Upon notification to the sponsor of its failure to carry out the approved program, the Department shall impose such sanctions as noted in 49

CFR Part 23, Subpart E, which sanctions may include termination of the agreement or other measures which may affect the ability of the sponsor to obtain future DOT financial assistance.

d. The sponsor agrees to advise such subrecipient, contractor, or subcontractor that failure to carry out the requirements in 49 CFR Part 23, paragraph 23.43(a), shall constitute a breach of contract and, after notification of the Department, may result in termination of the agreement or contract by the sponsor or such remedy as the sponsor deems appropriate.

e. Concerning lessees, the sponsor agrees that it shall not exclude MBEs from participation in business opportunities by entering into long-term, exclusive agreements with non-MBEs for the operation of major transportation-related activities or major activities for the provision of goods and services to the facility or to the public on the facility, as set forth in 49 CFR Part 23.

37. *Equal Opportunity Clause.*

a. It agrees that it will be bound by the equal opportunity clause of 41 CFR Part 60-1.4 with respect to its own employment practices when it participates in Federally assisted construction work: provided that if the applicant so participating is a state or local government, the equal opportunity clause is not applicable to any agency, instrumentality, or subdivision of such

Government which does not participate in work on or under the contract.

b. It agrees that it will assist and cooperate actively with the FAA and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with the equal opportunity clause and rules, regulations, and relevant orders of the Secretary of Labor, that it will furnish the FAA and the Secretary of Labor such information as may be required for the supervision of such compliance, and that it will otherwise assist the FAA in the discharge of the agency's primary responsibility for securing compliance.

c. It further agrees that it will refrain from entering into any contract or contract modification, subject to Executive Order 11246, of September 24, 1965, with a contractor debarred from or who has not demonstrated eligibility for, Government contracts and Federally assisted construction contracts pursuant to the Executive Order and will carry out such sanctions and penalties for violation of the equal opportunity clause as may be imposed upon contractors and subcontractors by the FAA or the Secretary of Labor pursuant to Part II, Subpart D of the Executive Order. In addition, the sponsor agrees that if it fails or refuses to comply with these undertakings, the FAA may take any or all of the following actions: cancel, terminate, or suspend in whole or in part this grant (contract, loan, insurance guarantee);

refrain from extending any further assistance to the sponsor under the program with respect to which the failure or refund occurred until satisfactory assurance of future compliance has been received from the sponsor; or refer the case to the Department of Justice for appropriate legal proceedings.

38. *Violating facilities.* It will insure that the facilities under its ownership, lease, or supervision which shall be utilized in the accomplishment are not listed on the Environmental Protection Agency's (EPA) list of violating facilities and that it will notify the Federal grantor agency of the receipt of any communication from the Director of the EPA Office of Federal activities indicating that a facility to be utilized in the project is under consideration for listing by the EPA.

39. *Flood insurance.* It will comply with the flood insurance purchase requirements of Section 102(a) of the Flood Disaster Protection Act of 1973, Public Law 93-234, 87 Stat. 975, approved December 31, 1976. Section 102(a) requires, on and after March 2, 1975, the purchase of flood insurance in communities where such insurance is available as condition for the receipt of any Federal financial assistance for construction or acquisition purposes for use in any area that has been identified by the Secretary of the Department of Housing and Urban Development as an area having special flood hazards. The phrase "Federal financial assistance" includes any form of loan, grant, guaranty, insurance payment, rebate,

subsidy, disaster assistance loan or grant, or any other form of direct or indirect Federal assistance.

40. *Historic preservation.* It will assist the Federal grantor agency in its compliance with Section 106 of the National Historic Preservation Act of 1966 as amended (16 U.S.C. 470), Executive Order 11593, and the Archeological and Historic Preservation Act of 1966 (16 U.S.C. 469a-1 et seq.) by (a) consulting with the State Historic Preservation Officer on the conduct of investigations, as necessary, to identify properties listed in or eligible for inclusion in the National Register of Historic Places that are subject to adverse effects (see 36 CFR Part 800.8) by the activity, and notifying the Federal grantor agency of the existence of any such properties, and by (b) complying with all requirements established by the Federal grantor agency to avoid or mitigate adverse effects upon such properties.

41. *Rates for Air Carriers and Fixed Base Operators.* It agrees that (A) each air carrier, authorized to engage directly in air transportation pursuant to Section 401 or 402 of the Federal Aviation Act of 1953, using such airport shall be subject to nondiscriminatory and substantially comparable rates, fees, rentals and other charges and nondiscriminatory conditions as are applicable to all such air carriers which make similar use of such airport and which utilize similar facilities, subject to reasonable classifications such as tenants or nontenants, and combined passenger and cargo flights or all cargo flights, and such classification or status as tenant shall not be unreasonably withheld by any sponsor provided an

air carrier assumes obligations substantially similar to those already imposed on tenant air carriers, and (B) each fixed base operator using a general aviation airport shall be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other fixed base operators making the same or similar uses of such airport utilizing the same or similar facilities; provision (A) above, shall not require the reformation of any lease or other contract entered into by a sponsor before July 12, 1976; provision (B) above, shall not require the reformation of any lease or other contract entered into by a sponsor before July 1, 1975.

42. *Computation of Rates.* It is understood and agreed that no part of the Federal share of an airport development project for which a grant is made under the Airport and Airway Development Act of 1970, as amended (49 U.S.C. 1701 et seq.), or under the Federal Airport Act, as amended (49 U.S.C. 1101 et seq.), shall be included in the rate base in establishing fees, rates, and charges for users of the airport.

Office of the Attorney General
Washington, D.C. 20530

July 17, 1981

Re: Approval of Department of Transportation Minority Business Enterprise Regulation, as amended

Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d to d-4, prohibits discrimination on the ground of race, color or national origin in programs receiving federal financial assistance. Section 905 of the Railroad Revitalization and Regulatory Reform Act of 1976, 45 U.S.C. Sec. 803; Section 30 of the Airport and Airway Development Act Amendments of 1976, 49 U.S.C. Sec. 1730; the Urban Mass Transportation Act of 1964, as amended by Section 19 of the Surface Transportation Assistance Act of 1978, 49 U.S.C. Sec. 1615; and Section 162(a) of the Federal Aid to Highways Act of 1973, 23 U.S.C. Sec. 324; prohibit discrimination in programs receiving financial assistance from the Department of Transportation on one or more of the following grounds: race, creed, color, national origin or sex.

The regulation entitled "Participation by Minority Business Enterprise in Department of Transportation Programs", 45 Fed. Reg. 21172 (March 31, 1980), as amended by 46 Fed. Reg. 23457 (April 27, 1981), has been adopted by the Secretary of Transportation in

implementation of the aforementioned statutory provisions.

Pursuant to Executive Order 12250 (1980), which authorizes the Attorney General to approve and concur in regulations implementing Title VI and the nondiscrimination provisions of other laws, I hereby approve and concur in the attached regulation, as amended.

s/s William French Smith
Attorney General